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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BRUCE GORDON, SR., *et al.*

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

i. Section 205 of the Soldiers' and Sailors' Civil Relief Act, 50 App. U.S.C. 525 (Section 205) provides that the period of military service shall not be included in computing any period limited by law for the bringing of any action or proceeding by or against any person in military service or by or against his heirs, executors or assigns. The question presented is whether Section 205 tolls the statute of limitations governing a servicemember's claim for consequential damages incurred as a result of injuries to his child even if the child's claim for personal injuries is time-barred;

A similar issue, interpreting Section 205, has been granted *certiorari*, and is scheduled for oral argument before this Court on January 11, 1993. *Conroy v. Aniskoff*, No. 91-1353.

ii. Petitioner Bruce Gordon, Jr. was injured by the failure of attending physicians to take professionally recognized and required actions during his childbirth, and the petitioners were unaware that the injury was related to medical care. The Court of Appeals below nevertheless ruled that petitioners should have known who caused the injury and brought a timely suit. The question presented in these circumstances is whether, for statute of limitations purposes under the Federal Tort Claims Act, this Court's decision in *Kubrick v. United States*, 444 U.S. 111 (1979) establishes a workable standard for determining whether a plaintiff should have known who caused his injury, without also requiring that the plaintiff know what caused his injury.

PARTIES TO THE PROCEEDING

The petitioners are Bruce Gordon, Sr., Brenda Gordon Brantley and Bruce Gordon, Jr. The respondent, defendant below, is the United States.

TABLE OF CONTENTS

Opinions Below 1
Jurisdiction 1
Statutory Provisions Involved 2
Statement 2
Reasons for Granting the Petition 8
Conclusion 23
Appendix A 1a
Appendix B 6a
Appendix C 8a
Appendix D 10a
Appendix E 21a

TABLE OF AUTHORITIES

CASES	PAGE(S)
Barstow v. State, 742 S.W.2d 495 (Tex. App. 1987) . .	12
Bickford v. United States, 228 Ct. Cl. 321, 656 F.2d 636 (1981)	11,12,13
Carr v. Yokahama Specie Bank, Ltd. of San Francisco, 200 F.2d 251, 255 (9th Cir. 1952)	22
Card v. American Brands Corp., 401 F.Supp. 1186 (S.D.N.Y. 1975)	13,14
Clark v. Mechanics' American National Bank, 282 F. 589 (8th Cir. 1922)	11
Colleen v. United States, 843 F.2d 329, 331 (9th Cir. 1987)	22
Conroy v. Aniskoff, No. 91-1353, U.S. Supreme Court	8
Donohue v. Ward, 298 S.C. 75, 378 S.E.2d 261 (S.C. App. 1989)	12
Drazan v. United States, 762 F.2d 56 (7th Cir. 1985)	20
Herrera-Diaz v. U.S. Dept. of Navy, 845, F.2d 1534 (9th Cir.), *cert. denied*, 488 U.S. 924 (1988)	19,21
In re Swine Flu Products Liability Litigation, 764 F.2d 637 (9th Cir. 1985)	17
Irwin v. Veterans Administration, ___ U.S. ___, 111 S.Ct. 453 (1990)	9,11,16
Jastremski v. United States, 737 F.2d 666 (7th Cir. 1984)	20
Kubrick v. United States, 444 U.S. 111 (1979)	9,15,17

Lee v. United States, 485 F. Supp. 883 (E.D.N.Y. 1980) 20

Lester v. United States, 487 F.Supp. 1033 (N.D. Tex. 1980) 10,11,13,14

Lopez v. Waldrum Estate, 249 Ark. 558, 460 S.W.2d 61 (1970) 13

Los Angeles Shipbuilding and Drydock Corp. v. United States, 289 F.2d 222 (9th Cir. 1961) . 22

Mason v. Texaco, Inc., 862 F.2d 242 (10th Cir. 1988) 12

McCance v. Lindau, 63 Md. App. 504, 492 A.2d 1352 (Md. App. 1985) 12

Miller v. United States, 803 F. Supp. 1120 (E.D. Va., 1992) 10,12,13,14

Mitchell v. Phillips, 58 Pa. D. & C.2d 314 (1972) 13

Nemmers v. United States, 795 F.2d 628, 631, *aff'd*, 870 F. 2d 426 (7th Cir. 1989) 17,19-20

Oberlin v. United States, 727 F.Supp. 946 (E.D. Pa. 1989) 11,12

Osborn v. United States, 918 F.2d 724, 733 (8th Cir. 1990) 22

Otto v. National Institute of Health, 815 F.2d 985, 989 (4th Cir. 1987) 18

Pannell v. Continental Can Co., Inc., 554 F.2d 216 (5th Cir. 1977) 12

Raddatz v. United States, 750 F.2d 791 (9th Cir. 1984) 18

Ray v. Porter, 464 F.2d 452 (6th Cir. 1972) 11,14

Ricard v. Birch, 529 F.2d 214 (4th Cir. 1975) 10,11,12,13

Rosales v. United States, 824 F.2d 799 (9th Cir. 1987) 18,19,20,21

Stephan v. United States, 490 F.Supp. 323 (W.D. Mich. 1980) 11

The West Point, 71 F.Supp. 206 (E.D. Va. 1947) 11

United States v. United States Gypsum Co., 333 U.S. 364, (1948) 22

Urie v. Thompson, 337 U.S. 163 (1949) 9,15,16

Wanner v. Glen Ellen Corp., 373 F.Supp. 983 (D.Vt. 1974) 13

STATUTES:

Federal Tort Claims Act, 28 U.S.C. 1346(b), 2401(b), 2671 *et seq.*:

28 U.S.C. 1254(1) . . . . . *passim*

28 U.S.C. 2401(b) . . . . . *passim*

28 U.S.C. 2674 . . . . . *passim*

Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. App. 525 (205):

50 U.S.C. App. 510, 511, 525 . . . . . *passim*

MISCELLANEOUS:

40 Op. Attorney General 97 (1941) 10

Federal Rule of Civil Procedure 52 (a) 22

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UNITED STATES OF AMERICA

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Bruce Gordon, Sr., Brenda Gordon Brantley and Bruce Gordon, Jr., by counsel, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-5a), the order denying the Petition for Rehearing (App. B, *infra*, 6a), and the opinion of the district court (App. D, *infra*, 10a-20a), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1992. A petition for rehearing was denied on October 5, 1992 (App. B, *infra*, 6a). The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. 2401(b) provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

2. Section 205, 50 U.S.C. App. 525 states:

> The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service, nor shall any part of such period which occurs after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 [Oct. 6, 1942] be included in computing any period now or hereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax or assessment.

50 U.S.C. App. 525.

STATEMENT

Petitioner Bruce Gordon, Jr. (Bruce) is the natural child of Petitioners Bruce Gordon, Sr. (Mr. Gordon) and Brenda Gordon Brantley (Mrs. Brantley). Mr. Gordon has been on active duty

with the United States Air Force continuously since Bruce was born on June 25, 1984.[1]

On June 25, 1984 at 9:40 a.m., Mrs. Brantley was admitted to the Sheppard Air Force Base Hospital (the Hospital), where Bruce was born at 12:40 p.m. Shortly before Mrs. Brantley's admission, her amniotic membrane spontaneously ruptured, revealing a green, meconium-stained amniotic fluid, a sign of potential fetal distress recorded in her medical record upon admission. (App.D, *infra*, 10a-11a).

At 9:50 a.m., Jyh Chewn Liang, M.D. (Dr. Liang) was notified of Mrs. Brantley's admission. At 10:00 a.m., Mrs. Brantley was connected to a fetal heart monitor which produced tracings of fetal heart activity until shortly before Bruce was born. Dr. Liang testified that the fetal heart tracing immediately revealed that "the baby was in trouble" because, although the heart rate was normal, the heartbeat was not "varied, variable, or responsive". (App.D, *infra* 11a - 12a). Medical expert witnesses, including the United States' expert witness on the standard of care, Dr. Barry Schifrin, testified that the fetal heart tracing was clearly abnormal and was consistent with ongoing asphyxia.

Upon his initial examination at 10:00 a.m., Dr. Liang knew that Mrs. Brantley (who was then only four centimeters dilated) would not be ready to deliver the child vaginally until eight to twelve hours later, and that a cesarean delivery was necessary to relieve the child's distress. (App.D, *infra*, 11a - 12a). Although guidelines adopted by the American College of Obstetricians and Gynecologists (ACOG) require a physician to commence a cesarean delivery within thirty minutes of deciding that a cesarean is necessary, the procedure did not commence

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[1] Bruce's mother received the military obstetrical care at issue in her capacity as Mr. Gordon's dependent wife. Mr. and Mrs. Gordon divorced in October, 1988. On January 13, 1989, Brenda Gordon married Leon Brantley. They were divorced on November 19, 1990.

until 12:15 p.m., over two hours later. In the interim, Dr. Liang went on a routine visit of the [Hospital] Clinic and did not further attend to Mrs. Brantley until he returned to the Hospital at 11:30 a.m.

After he returned to the hospital, Dr. Liang ascertained that Bruce's heart rate had declined, a finding to which he attached no medical significance, and had been continuously non-reactive since 10:00 a.m. (App.D, *infra*, 12a) Although Dr. Liang acknowledged essentially the same findings at 10:00 a.m., he now recorded on Mrs. Brantley's chart, "11:30: impression of fetal distress" and ordered a cesarean on a non-emergency basis. (App.D, *infra*, 12a) Dr. Liang testified that he ordered the cesarean "asap" rather than on an emergency basis because the child's distress was "chronic" rather than "acute".

The procedure commenced at 12:15 p.m., and culminated in Bruce's birth at 12:40 p.m. Bruce was not breathing, and had no heartbeat or signs of life at birth and for several minutes thereafter. (App.D, *infra*, 12a - 13a)

When Mrs. Brantley emerged from general anesthesia, Hospital personnel told her that Bruce was not breathing at birth because he "swallowed some of his stool" (*i.e.*, had aspirated meconium) and that he would be transferred to Wilford Hall Medical Center in connection with his respiratory difficulty.

In connection with Bruce's Hospital admission at birth, Dr. Liang diagnosed Bruce's condition as "respiratory distress secondary to meconium aspiration." On August 14, 1985, three weeks after the birth, Dr. Liang recorded in Mrs. Brantley's medical record, "diagnosis of fetal distress was made immediately and the patient was brought to surgery as soon as possible." Although Dr. Liang testified that the surgery was performed on a non-emergency basis, Dr. Liang described the surgery in the medical record as an "emergency" cesarean section.

As a result of the United States' two and one-half hour delay in delivering Bruce by cesarean section, Bruce endured hypoxic ischemic encephalopathy, *i.e.*, brain damage due to lack of oxygen and blood flow to the brain during labor and delivery. (App.D, *infra*, 15a-16a) As a result, Bruce has profound mental disabilities, profound physical disabilities and microcephaly (inadequate head growth). (App.D, *infra*, 15a-16a) Although seven years old at the time of trial, his functions were at the level of a four to eight month old infant.

On October 3, 1988, Bruce, through his father, filed an administrative claim under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.* to recover for brain damage, cerebral palsy and other permanent injuries he suffered in connection with his birth in a military hospital. On the same day, his parents filed separate administrative claims for medical expenses, mental anguish and other consequential damages they suffered as a result of his injuries. On November 25, 1989, the administrative claims were denied as time-barred.

On May 15, 1990, pursuant to 28 U.S.C. 1346(b), petitioners timely filed an original civil action against the United States in the United States District Court for the Western District of Washington. A four day trial was held in July, 1991. On July 30, 1991, the district court entered judgment against the United States in the sum of $8,257,023.00 plus costs (App.E, infra, 21a). In comprehensive findings entered pursuant to Federal Rule of Civil Procedure 52(a), the district court found that the United States' negligent failure to timely deliver Bruce by Cesarean section proximately caused him to suffer profound mental and physical injuries, brain damage and cerebral palsy.[2]

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[2] Among the many comprehensive findings supporting this conclusion was the following: "It took over two and one-half hours [after Mrs. Brantley's hospital admission] for Dr. Liang to perform a Cesarean section. This unreasonable delay by Dr. Liang in delivering [Bruce] is a proximate cause of [Bruce's] multiple injuries. (*See* App.D, *infra*, 15a).

Applying the *Kubrick* standard to the evidence adduced at trial, the district court further found that petitioners' cause of action accrued less than two years before the filing of their administrative claims on October 3, 1988.[3] (App.D, *infra*, 18a), *citing* 28 U.S.C. 2401(b)[4]].

The district court's award included, *inter alia*, a $95,000.00 award to Mr. Gordon for loss of filial consortium and past nursing services and a $4,539,493.00 award to Bruce for past and future medical expenses. Although the district court awarded the latter damages to Bruce, it articulated that "should any of the...awards to [Bruce] for his medical services and commodities be found to more properly belong to either or both of his parents to provide for Bruce's care, then those amounts that were designated for Bruce, Jr. should be awarded to the appropriate parent(s)." [App.D, *infra*, 19a).

On appeal to the United States Court of Appeals for the Ninth Circuit, the United States argued that the district court clearly erred in ruling that Bruce's and Mrs. Gordon's claims were not time-barred but did not challenge the $95,000.00 award

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[3] This conclusion was based on the following well-supported factual findings: 1) Bruce's Hospital medical record describes his diagnosis as "respiratory distress secondary to meconium aspiration" (App.D, *infra*, 14a); and 2) "at no time did any medical personnel, or anyone else, suggest to Mr. and Mrs. Gordon that Bruce's multiple handicaps are due to anything other than the natural stresses of birth and his own aspiration of his meconium" (App.D, *infra*, 15a); 3) "Plaintiffs did not know nor in the exercise of reasonable diligence should they have known the cause of Bruce's injuries (i.e. oxygen deprivation during labor) more than two years prior to October 3, 1988" (App.D, *infra*, 15a).

[4] 28 U.S.C. 2401(b) states:

A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claims by the agency to which it was presented.

to Mr. Gordon as time-barred or at all. Petitioners countered that the evidence and applicable law amply supported the district court's findings and, in addition, that Section 205 tolled the statute of limitations applicable to Mr. Gordon's claim for consequential damages.

In a Memorandum Opinion filed on June 25, 1992, without addressing Section 205, the court of appeals reversed the judgment in its entirety, including Mr. Gordon's $95,000.00 award, "on the ground that the claim is barred by the statute of limitations". (App. A, *infra*, 2a). The Court of Appeals, claiming to rely on *Kubrick*, held that the claim accrued in 1984 because "[s]hortly after Bruce Jr.'s birth, Mrs. Brantley knew that he had breathing problems caused by meconium aspiration. When he was three months old, doctors told her they were concerned by his slow head growth. By late 1984, she knew that he was developmentally delayed and that the cause was stress at birth." (App.A, *infra*, 5a)

On July 7, 1992, petitioners timely filed a Petition for Rehearing before the Court of Appeals in which they again articulated that Section 205 tolled the statute of limitations governing Mr. Gordon's claim for mental anguish, loss of filial consortium and past nursing and custodial services for which the district court awarded him $95,000.00; and 2) tolled the statute of limitations governing Mr. Gordon's claim for Bruce's past and future medical and related expenses, a significant element of damage with respect to which a remand was requested.

On July 15, 1992, in a letter to Plaintiffs' counsel, the United States requested that Plaintiffs dismiss that portion of the Petition for Rehearing which concerns Mr. Gordon's $95,000.00 award on the ground that the United States did not maintain that the statute of limitations barred Mr. Gordon's claim for that amount, that the order of the court of appeals should not be construed to affect that award, and that on remand

the district court should dismiss the Complaint but leave undisturbed Mr. Gordon's award of $95,000.00. (App.C, *infra*, 8a).

Plaintiffs filed a Supplement to their Petition for Rehearing in which they communicated the United States' concession on this issue to the court of appeals and further advised the court that this concession did not affect the following issues also raised in the Petition for Rehearing: Mr. Gordon's entitlement to prevail on his claim (as a father legally responsible for Bruce's medical expenses) for Bruce's past and future medical care and related expenses; 2) Plaintiffs' request for a remand for a recalculation of these additional damages and the entry of judgment in favor of Mr. Gordon with respect thereto.

On October 5, 1992, the court of appeals denied the Petition for Rehearing, without any comment on the Soldiers' and Sailors' Civil Relief Act, but amended its Memorandum Disposition of June 25, 1992 to state that "the United States appeals all but $95,000.00 of the district court's award" and that "except for the award of $95,000.00, not contested by the government, the judgment of the district court is reversed." (App. B, *infra*, 6a)

On October 30, 1992, the court of appeals granted Plaintiffs" Motion to Stay the Issuance of the Mandate until December 26, 1992.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision, which refuses to recognize the tolling provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 (SSCRA) contained in 50 U.S.C. App. 525, is contrary to the unambiguous and unqualified language of the statute. Moreover, there is a conflict among the circuits and state supreme courts concerning the application of Section 525. Additionally, this Court has granted *certiorari* on a case scheduled for oral argument on January 11, 1993, which also involves the application of Section 525. *Conroy v. Aniskoff*, No. 91-1353.

The United States, as *amicus curiae* in *Conroy*, has filed briefs in support of the petition for a writ of *certiorari*, and of an interpretation of Section 525 to provide for the tolling of statutes of limitations in favor of servicemembers.

As a second question, the Ninth Circuit has applied an interpretation of the accrual of a cause of action under the Federal Tort Claims Act, 28 U.S.C. 2401(b), which is inconsistent with this Court's decision in *Kubrick v. United States*, 444 U.S. 111 (1979). Despite this Court's holding that a cause of action accrues when a claimant is aware of an injury and its cause, the lower Federal courts have taken diverse views in the application of that rule. This is especially true in determining the cause of an injury. The effect of the Ninth Circuit's decision is to have a cause of action accrue although the claimants had been informed by military doctors that any injuries suffered by the child were caused by the natural stresses of birth. The claimants believed this information and had no reason to suspect that it was the doctors' failure to recognize fetal distress ongoing for more than two hours prior to his birth that was causing oxygen deprivation to the child's brain resulting in brain damage. The effect of the Ninth Circuit's decision is to impose a duty on *all patients* who incur an injury or unexpected outcome associated with medical treatment to obtain their medical records and have them scrutinized just in case the government's physicians did something wrong. Such a rule is inconsistent with *Kubrick*, *Urie v. Thompson*, 337 U.S. 163 (1949) (blameless ignorance), and *Irwin v. Veterans Administration*, ___ U.S. ___, 111 S.Ct. 453 (1990) (equitable tolling).

1. The SSCRA was enacted "to suspend the enforcement of civil liabilities . . . of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the nation" and to temporarily suspend "legal proceedings and transactions which may prejudice the civil rights of such service . . . ." *See* 50 U.S.C.

App. at 510. The Act is intended to protect the civil rights of individuals employed in the United States Armed Services, to allow servicemen to avoid the distractions of civil litigation while discharging their military duties, and to protect the rights of individuals having causes of action against members of the Armed Services. *Lester v. United States*, 487 F.Supp. 1033 (N.D. Tex. 1980), *citing with approval Ricard v. Birch*, 529 F.2d 214 (4th Cir. 1975).

One of the most significant provisions of the Act is the tolling provision of Section 525. *Lester v. United States*, 487 F.Supp. at 1038. That section states:

> The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court ... or other agency of government by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether ... such action or proceeding shall have accrued prior to or during the period of such service ...

50 U.S.C. App. 525

In accordance with this mandatory language, Section 525 has been uniformly construed to toll the two-year statute of limitations governing suits under the Federal Tort Claims Act, 28 U.S.C. 2401(b).[5] *See Miller v. United States*, 803 F. Supp.

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[5] This well-established principle finds firm support in the language of the Act. Specifically, Section 525 tolls the statute of limitations applicable to actions against, *inter alia*, entities "secondarily liable" for the obligations of persons in military service. 50 U.S.C. App. 511. In addition, the Act states that its provisions, including Section 525, "shall apply to the United States." 50 U.S.C. App. 512. In 1941, the Attorney General of the United States advised that Section 512 confirms the Act's substantive and not merely jurisdictional application to the United States and all federal agencies. *See* 40 Op. Att'y Gen. 97 (1941).

1120 (E.D. Va., 1992); *Lester v. United States*, 487 F.Supp. at 1033; *Ricard v. Birch*, 529 F.2d at 214; *Ray v. Porter*, 464 F.2d 452 (6th Cir. 1972); *Stephan v. United States*, 490 F.Supp. 323 (W.D. Mich. 1980); *Oberlin v. United States*, 727 F.Supp. 946 (E.D. Pa. 1989); *Clark v. Mechanics' American National Bank*, 282 F. 589 (8th Cir. 1922); *The West Point*, 71 F.Supp. 206 (E.D. Va. 1947).

Also in accordance with Section 525's mandatory language, the limitations period for bringing a federal tort action is unconditional and will be tolled whether or not the serviceman's military service has handicapped his ability to bring suit. *Bickford v. United States*, 228 Ct. Cl. 321, 656 F.2d 636 (1981), *citing with approval Ricard v. Birch*, 529 F.2d at 214.[6] "The

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While the Act has been amended several times since the Federal Tort Claims Act was enacted in 1946, 28 U.S.C. 1346(b), 2671 *et seq.*, these amendments have not diminished the applicability of the Act to federal tort actions based on the United States' vicarious liability for the torts of servicemembers. Sections 525, 511 and 512, construed *in pari materia*, therefore demand a finding that Section 525 tolling applies to suits maintained against servicemembers for whose torts the United States is secondarily liable.

It should also be noted that the Federal Tort Claims Act renders the United States liable for the torts of federal employees "in the same manner and to the same extent as a private individual under like circumstances...". *See* 28 U.S.C. 2674. Thus, if Section 525 would toll an action against the individual on whose tort the federal tort action is based, Section 525 also tolls the federal tort action against the United States. *See* 28 U.S.C. 2674. *See also Irwin v. Veterans Administration*, 111 S.Ct. 453 (1990), in which the Supreme Court recently reaffirmed the principle that statutes of limitations governing suits against the United States are subject to the same tolling principles applicable in suits between private individuals.

[6] In *Ricard*, 529 F.2d at 214, the Fourth Circuit articulated that the stay provision of the Act, 50 U.S.C. 521, inapplicable here, entitles a servicemember-defendant to stay legal proceedings against him if he demonstrates that his military service handicaps his ability to defend suit but that the tolling provision of Section 525 (which Mr. Gordon seeks to exercise) requires no

only critical factor is military service; once that circumstance is shown, the period of limitations is automatically tolled for the duration of the service...".[7] *Ricard v. Birch*, 529 F.2d at 216. *See also Bickford v. United States*, 656 F.2d at 636; *Mason v. Texaco, Inc.*,[8] 862 F.2d 242 (10th Cir. 1988); *Miller v. United States*, 803 F.Supp. 1120 (E.D.Va. 1992); *Oberlin v. United States*, 727 F.Supp at 946; *Barstow v. State*, 742 S.W.2d 495 (Tex. App. 1987); *Donohue v. Ward*, 298 S.C. 75, 378 S.E.2d 261 (S.C. App. 1989); *McCance v. Lindau*, 63 Md. App. 504, 492 A.2d 1352 (Md. App. 1985).

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such demonstration and "is unconditional. The only critical factor is military service; once that circumstance is shown, the period of limitations is automatically tolled for the duration of service, though an adverse plaintiff [i.e., one who seeks to maintain suit against a person in military service] may file sooner if service of process may be had." *Id.* at 217.

[7] While one Federal circuit case (involving facts outside the ambit of Section 525) held that Section 525 does not apply to career servicemembers, *see Pannell v. Continental Can Co., Inc.*, 554 F.2d 216 (5th Cir. 1977), Congress recently nullified that precedent by clarifying in the 1991 Amendments to the Act that "period of military service" as used in Section 525 "means, in the case of *any person*, the period beginning on the date on which the person enters active service and ending on the date of the person's release." *See* Soldiers' and Sailors' Civil Relief Act of 1991, 105 Stat. 34, P.L. 102-12 (March 18, 1991). (emphasis supplied). *See also Barstow v. State*, 742 S.W.2d 495 (Tex. App. 1987), in which the Court of Appeals of Texas, rejecting *Pannell*, confirmed that Section 525 tolls the statute of limitations applicable to claims maintained on behalf of all servicemembers, including career servicemembers, without regard to whether military service handicapped their ability to maintain suit. To the same effect, *see McCance v. Lindau*, 63 Md. App. at 504, 492 A.2d at 1352; *Donohue v. Ward*, 298 S.C. at 75, 378 S.E.2d at 261.

[8] In *Mason v. Texaco, Inc.*, 862 F.2d at 242, the United States Court of Appeals for the Tenth Circuit rejected the assertion that Section 525 does not apply to career servicemembers and adopted the law articulated by the Fourth Circuit, stating:

Because Mr. Gordon has been continuously on active-duty with the Armed Forces since Bruce's birth on June 25, 1984, Mr. Gordon's federal tort claim (for mental anguish, loss of filial consortium, and medical, rehabilitative and custodial expenses associated with Bruce's care) was tolled during his period of active-duty military service and is not time-barred. *See e.g. Lester v. United States*, 487 F.Supp. at 1033 and cases cited *supra*, at 10-11.

2. In every discovered case involving a servicemember's claim for loss of consortium, medical expenses or other consequential damages he suffered as a result of injuries to a civilian family member, courts have held that Section 525 tolls a servicemember's claim for such consequential damages even though the underlying civilian family member's claim for personal injuries or consequential damages is time-barred. *See, Miller v. United States*, 803 F. Supp. 1120, supra; *Lester v. United States*, 487 F.Supp. at 1035; *Card v. American Brands Corp.*, 401 F.Supp. 1186 (S.D.N.Y. 1975); *Lopez v. Waldrum Estate*, 249 Ark. 558, 460 S.W.2d 61 (1970); *Wanner v. Glen Ellen Corp.*, 373 F.Supp. 983 (D.Vt. 1974). *See also Mitchell v. Phillips*, 58 Pa. D. & C.2d 314 (1972) (holding that Section 525 tolled the two-year statute of limitations governing active-duty father's claim for consequential damages arising out of tortious injuries to his child and, in addition, tolled the child's claim for personal injuries).

> In our view, the language of the Soldiers' and Sailors' Civil Relief Act, of 1940, 50 U.S.C. App. 525, is clear and unambiguous. We find no reason to ignore the plain meaning of the statute, and we are persuaded that the correct course to follow is set forth in *Ricard v. Birch*, 529 F.2d 214 (4th Cir. 1975); and *Bickford v. United States*, 228 Ct. Cl. 321, 656 F.2d 636 (1981). The career status of [Plaintiff] Otis Mason does not negate the application of §525. The only condition to §525 is military service.

862 F.2d at 245.

In *Lester v. United States*, 487 F.Supp. at 1035, a former serviceman filed a federal tort action, individually and on behalf of his wife and the marital community estate for injuries his wife suffered when she fell from unguarded concrete stairs leading to the family home on a United States Naval Base. The United States moved to dismiss the action as time-barred on the ground that the administrative federal tort claim was not filed within the two-year period provided in 28 U.S.C. 2401(b). Mr. Lester countered that Section 525 tolled the limitations period until he was discharged from active military service.

Addressing these contentions, the United States District Court of the Northern District of Texas held that Mrs. Lester's claim for personal injury and loss of consortium was time-barred because only persons in the military service or persons having causes of action against such persons are entitled to the benefits of the tolling provision of the Act. *Id.* at 1039, *citing Ray v. Porter*, 464 F.2d at 455. *See also Card v. American Brands Corp.*, 401 F. Supp. at 1186. Significantly, after reviewing the Act and authorities decided thereunder, the court concluded that Section 525 tolled Mr. Lester's claim for the loss of consortium he endured as a result of his wife's injuries and awarded him $50,000.00. *Lester v. United States*, 487 F.Supp. at 1041.

In *Miller v. United States*, 803 F. Supp. 1120, three separate administrative claims were filed by Arlington Miller, III, and his parents, Mr. and Mrs. Arlington Miller, Jr., in July 1990, alleging negligence on the part of military physicians in the treatment of the child's hyperbilirubinemia shortly after his birth in 1976, which resulted in severe brain damage, mental retardation and multiple physical handicaps. In holding that the mother's and child's claims were barred by the Federal Tort Claims Act statute of limitations, the district Court held that Section 525 was tolled during Mr. Miller's military service regardless of whether his ability to pursue the action had been impaired by his military service. Because Mr. Miller remained on active duty until 1991,

his claim for medical expenses which he had previously paid or may reasonably incur in the future, was timely filed.

3. By its own concession before the court of appeals, the United States acknowledged that the statute of limitations did not bar the judgment in favor of Mr. Gordon. (App. C, *infra*, 8a). The only basis for that concession would be the United States' agreement with the petitioners' contention that SSCRA tolls statutes of limitations in favor of servicemen. Accordingly, the petition for a writ of certiorari should be granted in order to correct the Court of Appeals' failure to apply section 525 in favor of Mr. Gordon for all consequential damages to which he is entitled.

4. This Court articulated the law applicable to the accrual of a claim against the United States under the provisions of the Federal Tort Claims Act in *Kubrick v. United States*, 444 U.S. 111 (1979). There, the Court held that a medical malpractice claim does not accrue until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its cause. In fashioning this rule, the Court reasoned:

> "That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of a putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt *and who has inflicted the injury*. He is no longer at the mercy of the latter. There are others who can tell him if he has been wronged, and he need only ask."
>
> 444 U.S. at 122 (emphasis added).

In *Kubrick*, this Court reaffirmed its earlier decision in *Urie v. Thompson*, 337 U.S. 163 (1949), where it held that because of the plaintiff's "blameless ignorance" of the fact of

his injury, his claim did not accrue under the Federal Employers' Liability Act until his disease manifested itself. In that case, this Court was reluctant to charge the plaintiff with the "unknown or inherently unknowable."

Recently, in *Irwin v. Veterans Administration*, ____ U.S. ___, 111 S. Ct. 453 (1990), the Court held that statutes of limitations in all actions against the United States are subject to the same rebuttable presumption of equitable tolling applicable in actions against private defendants.

This case presents the important issue of defining "cause" with respect to the "accrual" of a claim under the Federal Tort Claims Act. Petitioners contend that the "blameless ignorance" doctrine relating to the fact of injury as announced in *Urie*, should also be applicable in situations where the plaintiff is blamelessly ignorant of the "cause" of his injury. Since the decision in *Kubrick*, the lower federal courts have taken widely diverse views in defining cause. As represented by the instant case, the Ninth Circuit has applied a rule that provides for a claim to accrue although the petitioners had been informed by military doctors that any injuries suffered by the child were caused by the natural stresses of birth. The petitioners had no reason to suspect that it was the doctors' failure to recognize fetal distress ongoing for more than two hours prior to the child's birth that was causing oxygen deprivation to the child's brain resulting in brain damage.

The petitioners are not asking the Court to postpone accrual until a plaintiff is aware of negligence. Rather, they request the Court to emphasize the equitable application of statute of limitations rules in those situations where a plaintiff is blamelessly ignorant of either the fact or cause of an injury.

The effect of the Ninth Circuit's decision is to impose a duty on all patients who incur any injury or unexpected outcome associated with medical treatment to obtain their medical records and have them scrutinized just in case the government's

physicians did something wrong. Such a rule disregards the guidelines set down by this Court in *Kubrick*, supra at 122, requiring that a plaintiff have knowledge of "who has inflicted the injury." Furthermore, it punishes a plaintiff who is blamelessly ignorant of the cause of an injury, and imposes a harsh and inequitable standard on a 20 year old mother who reasonably relied upon her physicians that the cause of her son's injuries was due to the natural stresses of birth and the baby's aspiration of his own meconium.

The rule for the accrual of a claim potentially affects every claim brought under the Federal Tort Claims Act, and the recurring nature of the issue makes review by this Court appropriate.

5. A sampling of some of the conflicting lower court decisions dealing with the application of Federal Tort Claims Act statute of limitations issues, highlights the problems of causation in reference to accrual of claims. The harsh rule applied by the Ninth Circuit in this case had been forewarned by the Seventh Circuit in *Nemmers v. United States*, 795 F.2d 628, 631, *aff'd*, 870 F. 2d 426 (7th Cir. 1989), wherein it stated that the statute of limitations should not be construed to compel everyone who knows of an injury to scour his medical records just in case the government's physician did something wrong.

An earlier decision from the Ninth Circuit accurately recognized the inherent difficulties in defining accrual, and properly broadened the application of the *Kubrick* rule in a wrongful death case. In *In re Swine Flu Products Liability Litigation*, 764 F.2d 637 (9th Cir. 1985), the court held that a plaintiff who is "blamelessly ignorant of the existence or cause of his injury should be accorded the benefits of the more liberal accrual standards" because "it is not until he learns of both the fact of injury and its cause that the malpractice plaintiff falls on the same footing as any negligence plaintiff." Id. at 640.

Because patients are expected to rely upon the advice of their physicians, where a plaintiff is given a credible explanation of his condition not pointing to the doctors' conduct as the causative agent, the patient should not be found to have failed to exercise reasonable diligence because he did not earlier pursue his claim. See, *Otto v. National Institute of Health*, 815 F.2d 985, 989 (4th Cir. 1987), where a claim for malpractice did not accrue until the patient was aware of the true nature of her injury, and not at an earlier time when the patient's doctors gave another explanation for complications that ensued.

Another case dealing with credible explanation, *Raddatz v. United States*, 750 F.2d 791 (9th Cir. 1984), held that a patient may reasonably rely on doctors' assurances that symptoms are a normal consequence of a condition not requiring treatment, such that the statute of limitations did not accrue until a later date when the patient discovered the symptoms to be the result of an infection.

Rosales v. United States, 824 F.2d 799 (9th Cir. 1987) held that a birth - injured child's cause of action did not accrue until her parents discovered the injury and its cause over two years after the birth. At birth, the parents knew that military physicians improperly failed to remove an intrauterine device in place during the mother's pregnancy, knew that this failure endangered the fetus, and knew that the child was born with a lazy eyelid, a potential sign of brain damage. Notwithstanding these facts, the court of appeals rejected the United States' contention that the parents should have conducted a factual investigation that would have earlier revealed the United States' responsibility for the injury. The court reasoned that even if the United States told the mother, during her pregnancy, that its failure to remove the intrauterine device endangered the fetus, the parents reasonably relied after birth on the United States' repeated assurances that the lazy eyelid was temporary and that the child was not injured. Under these circumstances, the court

held that the parents "reasonably should not have discovered the [existence of a cause of action] in light of assurances of a number of physicians "and had no duty to make the further inquiry that would have revealed the injury and its cause within two years of the birth. *Id.* at 804-5.

For the contrary proposition, see *Herrera-Diaz v. U.S. Dept. of Navy*, 845, F.2d 1534 (9th Cir.), *cert. denied*, 488 U.S. 924 (1988), in which the court of appeals affirmed the dismissal of a federal tort claim because the mother of a brain damaged baby did not file her claim within two years of discovering that her child was brain-injured as a result of "breathing problems" at birth. Significantly, the dismissal was founded on the parties' admissions that the physician offered no explanation for the brain damage and the mother did not ask for an explanation because she did not want to know. *Id.* at 1537-8.

In this case, unlike *Herrera Diaz*, petitioners' ignorance of the cause of Bruce's injuries was occasioned by their reliance on: 1) the United States' specific representation that meconium aspiration caused Bruce's condition at birth; and 2) the United States' further assurances that meconium aspiration was caused by the natural stresses of labor. Because the meconium aspiration explanation was plausible and would have induced a reasonable person to believe that Bruce's injuries were caused by a circumstance outside the control of the United States, petitioners were entitled to rely on it and should not have been expected to make further inquiry. *Rosales v. United States*, 824 F.2d at 804. In addition, because that representation sufficed to explain Bruce's "asphyxia" and "stress at birth," the United States' subsequent use (if any) of those terms would *not* have placed a reasonable 20 year old person on notice that the meconium aspiration explanation was false or that the United States caused or contributed to Bruce's injury.[9] *See also Nem-*

[9] In essence, the United States contends that all recipients of military medical care (even those assured by the United States that circumstances

mers v. United States, 870 F.2d 426 (7th Cir. 1989) (physicians' use of the phrases "trauma of birth" and "fetal distress during labor" were ambiguous phrases from which a reasonable person would *not* have suspected that acts or omissions of government physicians caused birth injury whether or not a specific explanation was given); *Lee v. United States*, 485 F. Supp. 883 (E.D.N.Y. 1980) (parent informed that newborn had difficulty breathing, fluid in the lungs and decreased levels of oxygen to the brain could reasonably have believed that the condition was wholly unrelated to physicians' conduct). *See also Jastremski v. United States*,[10] 737 F.2d 666 (7th Cir. 1984), *cited with approval in Rosales*, 824 F.2d at 805.

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outside its control caused an injury-producing complication) must analyze hospital records and otherwise investigate the United States' potential wrongdoing or otherwise forego the right to sue for emotionally and financially devastating injuries. In *Drazan v. United States*, 762 F.2d 56 (7th Cir. 1985), the Seventh Circuit decried the ghoulish consequences of this approach:

> [A]ny time someone suffered pain or illness or death in a Veterans Administration hospital, he (or in the case of death, his survivors) would request his hospital records to see whether diagnosis or treatment might have played a role in his distress — whether, that is, the harm might have been "iatrogenic" [doctor-caused]. He could not wait till he had reason to think he had suffered an iatrogenic harm; the two years might have run. We do not think such behavior should be encouraged, or that anything in *Kubrick* requires us to encourage it. The cause of which a federal tort claimant must have notice for the statute of limitations to begin to run is the cause that is in the government's control, not a concurrent but independent cause that would not lead anyone to suspect that the government had been responsible for the injury. The notice must be not of harm but of iatrogenic harm, though, as *Kubrick* holds, not necessarily of *negligent* iatrogenic harm.

Id. at 59 (emphasis supplied).

[10] In *Jastremski v. United States*, 737 F.2d 666, *supra*, the plaintiff was a pediatrician who witnessed his child's birth in a military hospital, knew that the child was not breathing at birth, knew that the child had seizures fifty-one

Unlike *Herrera-Diaz*, this case presents concealment [regarding injury or cause] that warrant[s] the tolling of the statute of limitations." *See Herrera-Diaz v. United States*, 845 F.2d at 1537-8. Thus, the evidence at trial established that the meconium aspiration explanation was materially false and that Bruce's Hospital Discharge Summary of August 14, 1984 contains at least two materially false misrepresentations equally designed to quell further investigation[11] and to conceal the existence of a cause of action. Thus, this case falls squarely within the principle, recognized by the Supreme Court in *Irwin v. United States*, 111 S.Ct at 453, and in *Herrera-Diaz*, 845 F.2d at 1537-8, that the statute of limitations is equitably tolled where the United States induces a plaintiff to allow the filing deadline to pass.

Finally, petitioners cannot be expected to have ascertained the medical cause of Bruce's injuries before Bruce's own doctors were able to do so. *See Rosales v. United States*, 824 F.2d at 805. In this case, Bruce's physician, Dr. Liang, testified that

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hours later for which Phenobarbital was prescribed, and knew that the child had an abnormal gait [indicative of cerebral palsy] at age two. Notwithstanding the father's knowledge and his medical training and experience, the Seventh Circuit held that the cause of action in medical negligence did not accrue until four years after birth when a friend of the father (also a physician) suggested during a social visit to the family home that the child might have cerebral palsy.

[11] Three weeks after Bruce's discharge from the Hospital, Dr. Liang recorded in the Discharge Summary, "diagnosis of fetal distress was made immediately, and the patient was brought to surgery as soon as possible." In actuality, while fetal distress was diagnosed immediately, Dr. Liang then went on a routine visit to the Clinic and did not further attend to Mrs. Brantley until he returned one and one-half hours later.

In addition, Dr. Liang reported that the operation was an "emergency" cesarean section when in actuality, he performed the cesarean on a non-emergency basis.

he does not know the cause of Bruce's condition.[12] Similarly, the United States' primary medical witness on causation, Dr. Kenneth Niswander, testified that, despite his analysis of Bruce's medical history, he did not know the cause of Bruce's condition. As such, there is no warrant for the United States' assertion that petitioners, who have no medical training, should have discovered the cause of Bruce's condition by October 3, 1986, five years before a trial at which the United States' own medical witnesses testified to their inability to do so.

As provided by Rule 52(a) of the Federal Rules of Civil Procedure, findings of fact in actions tried without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." See, *United States v. United States Gypsum Co.*, 333 U.S. 364, 394 (1948).

Because the district court's finding that petitioners acted with reasonable diligence is well-substantiated in fact and law, it is not clear error and should not have been overturned on appeal.[13] *Colleen v. United States*, 843 F.2d 329, 331 (9th Cir. 1987); *Osborn v. United States*, 918 F.2d 724, 733 (8th Cir. 1990).

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[12] A secondary (and duplicative) expert witness for the United States, Dr. Josephina Vallarta, testified that an MRI film procured for legal purposes one month before trial suggested a congenital anomaly.

[13] It is not the Court of Appeals' function to retry questions of fact determined by the trial court, even upon uncontradicted evidence, where differing inferences may reasonably be drawn from it. *Los Angeles Shipbuilding and Drydock Corp. v. United States*, 289 F.2d 222,227(9th Cir. 1961). Even where the evidence is conflicting, which evidence at issue manifestly is not, it is not clearly erroneous for the trial court to choose between two permissible and conflicting views as to the weight of the evidence, and the appellate court may not disturb the trial court's choice in

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 23, 1992

APPENDIX A

NOT FOR PUBLICATION

United States Court of Appeals

FOR THE NINTH CIRCUIT

BRUCE GORDON; BRENDA J. GORDON-BRANTLEY,
Plaintiffs-Appellees,

vs.

UNITED STATES OF AMERICA,
Defendant-Appellant.

FILED
June 25, 1992

No. 91-36121
D.C. No. CV-90-05206-JET

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Jack E. Tanner, District Judge, Presiding

Argued and Submitted June 2, 1992
Seattle, Washington

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3 section 1291. We reverse on the ground that the claim is time-barred under the statute of limitations.

Before: WRIGHT, CANBY and WIGGINS, Circuit Judges

The United States appeals the district court's award of $8,257,023 plus costs to appellees, Bruce Gordon, Jr. [Gordon], his mother, Brenda Brantley, and his father, Bruce Gordon, Sr., under the Federal Tort Claims Act [FTCA]. 28 U.S.C. § 1346(b), 2671-2680. The district court granted the award for medical malpractice by a doctor at Sheppard Air Force Base, Wichita Falls, Texas, who delivered Bruce Gordon, Jr. on June 25, 1984.

This court has jurisdiction pursuant to 28 U.S.C. 1291. We reverse on the ground that the claim is time-barred under the statute of limitations.

FACTS

Brenda Gordon [now Brenda Gordon Brantley] arrived at the obstetrics/gynecology clinic at the United States Air Force Hospital, Sheppard Air Force Base, Wichita Falls, Texas at 9:40 am. on June 25, 1984. She was married to an active duty serviceman and was more than eight months pregnant. Her amniotic membrane had spontaneously ruptured before her admission. A nurse-practitioner examined her and determined that she was in labor. Mrs. Brantley said that she had not felt fetal movement since the previous morning.

The obstetrician/gynecologist on call, Major Jyh-Chwen Liang, M.D., examined her at 10 am. Liang determined that the pregnancy was full term, that the membrane had ruptured and that there was meconium in the amniotic fluid.[1] A fetal heart monitor indicated a normal heart rate but an abnormal beat-to-beat variability, which caused Dr. Liang to decide that a Caesarian section might be necessary.

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[1] Meconium is fetal waste from the intestinal tract, which is usually not released prior to birth; thus, it is unusual for it to be in the amniotic fluid.

Dr. Liang monitored the fetal heart rate until 11:30 am., during which time the condition remained unchanged. At 11:30, Dr. Liang determined that the fetus was in distress, and he decided to perform a Caesarian section. At 12:15, the procedure was begun. After making an incision, the doctor found the amniotic fluid heavily stained with meconium.

Bruce Gordon, Jr. was born at 12:40 pm. Bruce Jr. had no heartbeat and he was not breathing. He received immediate medical attention and his condition improved. He was transferred to Wilford Hall Medical Center, where he was treated for meconium aspiration syndrome and pulmonary hypertension. He developed seizures five days later and was treated with phenobarbital. He was discharged on July 14. He was diagnosed as having suffered from birth asphyxia and persistent fetal circulation.

Bruce Jr.'s family moved soon thereafter to Washington state. Bruce Jr. was examined at Madigan Army Medical Center and referred to developmental pediatrics because his head growth was abnormal. The doctor in developmental pediatrics, Dr. Onufer, told Mrs. Brantley that he thought Bruce Jr. was developmentally delayed, was showing slow head growth and might have a seizure disorder because of fetal distress at birth. He referred Gordon to Mary Bridge Children's Hospital in Tacoma, Washington, where Gordon received physical therapy.

In late 1984, Dr. Onufer ordered a CAT scan, which revealed severe brain abnormalities. Doctors told Mrs. Brantley that Bruce Jr. was likely to be severely retarded. Bruce, Jr. is now seven, and he has physical and mental impairments. He has a form of cerebral palsy, mental retardation and microcephaly.

Appellees filed an administrative claim for medical malpractice with the Air Force on October 3, 1988. On November 25, 1989, the claim was dismissed as time barred under the two-year statute of limitations in the Federal Tort Claims Act.

Appellees brought this action in the United States District Court for the Western District of Washington.

STATUTE OF LIMITATIONS

The Federal Torts Claim Act authorizes lawsuits against the United States government by a person whose injuries were proximately caused by a government employee's negligence. We review for clear error the district court's factual determinations. *Shaw v. United States*, 741 F.2d 1202, 1205 (9th Cir. 1984). Here, the court concluded that Mrs. Brantley and Bruce Sr. could not have known the cause of their son's injuries within two years of his birth. This finding is clearly erroneous.

The FTCA provides that a tort claim against the federal government must be brought "within two years after such claim accrues." 28 U.S.C. § 2401(b). In medical malpractice actions under the FTCA, however, a claim does not accrue, and the limitation period does not begin to run, until a plaintiff discovers both the injury and its cause. *United States v. Kubrick*, 444 U.S. 111 (1979). When both the injury and its cause are known, the claim accrues even though the plaintiff is not aware that the injury may have been negligently inflicted. *Id.* at 123-24.

Relying on *Kubrick*, we developed an objective standard to determine when a medical malpractice action accrues under the FTCA. The claim accrues when a "'plaintiff has discovered, or in the exercise of reasonable diligence should have discovered both his injury and its cause.'" *Herrera-Diaz v. Dept. of Navy*, 845 F.2d 1534, 1537 (9th Cir. 1988) (quoting *Davis v. United States*, 642 F.2d 328, 331 (9th Cir. 1981), *cert. denied*, 455 U.S. 919 (1982)).

We applied this standard in *Fernandez v. United States*, 673 F.2d 269 (9th Cir. 1982). In *Fernandez*, we determined that parents of a child who developed jaundice shortly after his birth in 1958, "knew [by 1964], or had available the means of knowing, all there was to know about the cause of his injuries,

and who (the nurses and the doctors who diagnosed and treated his jaundice) were responsible." *Id.* at 271. We said that had the parents inquired at that time, they presumably would have learned of the possibility that their son had received treatment too late. His parents brought suit in 1976. We held that the statutory period barred the child's claim.

Also in *Herrera-Diaz*, 845 F.2d at 1537, we held that the limitation period barred a mother's negligence action against the government for her child's brain damage. In 1978, the mother learned that her son suffered from cerebral palsy caused by lack of oxygen to the brain at birth. She did not bring suit until 1984. We found that a reasonable person would have made some kind of inquiry, and that it was her burden, within the statutory period, to determine whether and whom to sue. *Id.* at 1537.

Here, as in *Fernandez* and *Herrera-Diaz*, the appellees were aware of Bruce Jr.'s injury and its cause more than two years before they filed suit. Shortly after Bruce Jr.'s birth, Mrs. Brantley knew that he had breathing problems caused by meconium aspiration. When he was three months old, doctors told her they were concerned by his slow head growth. By late 1984, she knew that he was developmentally delayed and that the cause was stress at birth. At that time she knew, or in the exercise of reasonable diligence should have discovered, both Bruce Jr.'s injury and its cause. *See Davis*, 642 F.2d at 331. The two year statute of limitation began to run at that time.

Bruce Jr.'s medical negligence claim accrued in 1984, and the district court should have dismissed this claim as time barred under 28 U.S.C. § 2401(b).

Because the statute of limitations issue is dispositive, we need not address the proximate cause or damages issues. The judgment of the district court is REVERSED.

APPENDIX B

United States Court of Appeals

FOR THE NINTH CIRCUIT

BRUCE GORDON; BRENDA J. GORDON-BRANTLEY,
Plaintiffs-Appellees,

vs.

UNITED STATES OF AMERICA,
Defendant-Appellant.

FILED
October 5, 1992

No. 91-36121
D.C. No. CV-90-05206-JET

ORDER

Before: WRIGHT, CANBY, and WIGGINS, Circuit Judges

The Memorandum Disposition, filed herein on June 25, 1992, is amended as follows:

1. The first sentence is stricken. In its place is inserted: "The United States appeals all but $95,000.00 of the district court's award of $8,259,023.00 plus costs to appellees, Bruce Gordon, Jr., [Gordon], his mother, Brenda Brantley, and his father, Bruce Gordon, Sr., under the Federal Tort Claims Act [FTCA]."

2. The last sentence on page six is stricken. In its place is inserted: "Except for the award of $95,000.00 to Bruce's father, not contested by the government, the judgment of the district court is reversed.

With the foregoing amendments to our Memorandum Disposition, the petition for rehearing is denied.

APPENDIX C

U.S. Department of Justice
Washington, D.C. 20530
July 15, 1992

Walter A. Oleniewski
Shulman, Rogers, Gandal, Pordy & Ecker, P.C.
11921 Rockville Pike, Suite 300
Rockville, Maryland 20852

Re: Bruce Gordon, et al. v. United States of *America, 9th Cir., No. 91-36121*

Dear Mr. Oleniewski:

We are in receipt of your petition for rehearing in the above case. I should like to call your attention to Point I of your petition regarding the $95,000 award to Mr. Gordon.

We do not think that the $95,000 judgment for Mr. Gordon for loss of consortium is encompassed within the order of the court of appeals reversing the judgment below. As you properly observe, the government did not maintain that the statute of limitations barred Mr. Gordon's claim for that amount (Appellant's brief, n.8; Reply brief n. 3, p. 8). Accordingly, it does not appear that the order of the court of appeals should be construed to affect that award. Rather, on remand, the district court should dismiss the complaint, but, should however, leave undisturbed Mr. Gordon's award of $95,000.

In view of the foregoing, we would suggest that you dismiss that portion of your petition for rehearing which seeks $95,000 for Mr. Gordon. If you do not intend to apply to the court for dismissal, please advise us so that we may submit such a motion to the court.

Very Truly Yours,

ROBERT S. GREENSPAN
Assistant Director, Appellate Staff
Civil Division

cc: James W. Feltus
McGavick, Graves, Beagle &
McNerthney
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APPENDIX D

IN THE

United States District Court

THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

BRUCE J. GORDON, et al.,

Plaintiff,

vs

UNITED STATES OF AMERICA,

Defendant.

FILED
July 30, 1991

NO. C90-5206T

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action under the Federal Tort Claims Act, came on for trial before the above-entitled court sitting without a jury. Walter Oleniewski, Esq. and James Feltus, Esq., appeared as counsel for plaintiffs. Brian C. Kipnis, Assistant United States Attorney, appeared as counsel for defendant. Having heard the testimony, examined the other evidence adduced by the parties, and heard the arguments of their counsel, and this cause having been submitted for decision, the court, being fully advised herein, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This action arose under the Federal Tort Claims Act, 28 U.S.C. §§1346(b) and 2671 *et seq*. The suit was timely filed on May 15, 1990, within the six-month period following the Air Force's denial of the plaintiffs' administrative claims on November 25, 1989.

2. Plaintiff Bruce Gordon, Jr. is the natural child of plaintiff Bruce Gordon, Sr. and Brenda Gordon Brantley.

3. Although Mr. and Mrs. Gordon are currently divorced, they were married at the time of Bruce, Jr. 's birth on June 25, 1984.

4. Bruce Gordon, Sr. was on active duty in the United States Air Force at the time of Bruce, Jr.'s birth, and has remained on active duty continuously since that time.

5. Bruce Gordon, Jr. was born at the United States Air Force Hospital, Sheppard Air Force Base, Wichita Falls, Texas, on June 25, 1984.

6. Mrs. Gordon had received prenatal care at the Sheppard Air Force Base hospital ("Hospital") prior to Bruce's birth.

7. At this time, Mrs. Gordon was 20 years old and pregnant with her first child.

8. The baby was at full term, approximately 39 weeks gestation.

At approximately 9:40 am. on June 25, 1984, Mrs. Gordon presented herself at the Hospital where she was examined and found to be in labor and had a fetal heart tone of 140.

9. Mrs. Gordon had spontaneously ruptured her membranes just prior to coming to the Hospital. The medical record reflects that she told the nurse that she had felt no movement of the fetus since yesterday morning.

10. Mrs. Gordon was admitted to the Hospital and fetal monitoring by scalp electrode was attempted but delayed because of the inability of the nurse to apply the electrode.

11. Mrs. Gordon was examined about 10:00 am. by Jason Liang, M.D. Dr. Liang is an OB/GYN who was, at that time, a major in the Air Force. Dr. Liang has no independent recollection of Mrs. Gordon. Dr. Liang noted, *inter alia*, his impression of a term gestation, spontaneous rupture of membranes, the presence of meconium, and a fetal heart tone of 140 beats per minute.

12. When monitoring was finally established shortly after 10:00 a.m., the fetal monitor tracing demonstrated that the baby was experiencing fetal distress.

13. The treating physician, Dr. Liang, did not perform a Cesarean section to deliver the baby until 12:40 pm.

14. At the time (approximately 10:00 am.) Dr. Liang examined Mrs. Gordon, he was of the opinion that the baby was demonstrating a non-reactive heart rate and that there may be a need for a Cesarean section.

15. The non-reactive heart rate continued for more than 20 minutes and caused Dr. Liang to be concerned about the well-being of the baby.

16. While in the hospital, Dr. Liang did not consider Mrs. Gordon to be in active labor.

17. Dr. Liang knew that it was not possible for Mrs. Gordon to have a vaginal delivery of the baby because she had not progressed in her labor.

18. At 11:30 a.m., Dr. Liang diagnosed the baby as being in fetal distress and planned to do a Cesarean section as soon as possible.

19. Regional anesthetic, in the form of an epidural block, was given Mrs. Gordon at approximately 12:15 p.m. Fetal heart

tone at the time was 120 beats per minute without variability. An incision was made by Dr. Liang but the patient experienced significant pain sensation. Accordingly, the anesthetist gave Mrs. Gordon crash general anesthesia followed by a rapid sequence intubation. Dr. Liang then continued the operation. When an incision was made in the lower uterine segment, the amniotic fluid revealed itself to be heavily meconium stained.

The head of the baby was delivered by surgeon's hand, and the nasal and oral cavities were suctioned completely to remove thick meconium with mucus. The baby was then delivered at 12:40 p.m. with fundal pressure. The umbilical cord was severed. However, the baby was not breathing and had no heartbeat when born. Resuscitation of the infant was begun immediately at the time of his delivery. The infant was intubated and bagged in the OR and Epinephrine and Narcan were given in the umbilical vein. The Apgar scores that were assigned were 0 at one minute, 1 at five minutes, and 8 at approximately 10 to 11 minutes.

20. An Apgar score is an universally accepted method of assessing the state of an infant shortly after birth.

21. In general, the higher the Apgar score, up to a maximum of 10, the better is the condition of the infant.

22. There are five Components of the Apgar score: heart rate, respiratory effort, tone, reflex irritability, and color, each of which can be given a score of 0, 1, or 2.

23. One minute after birth, Bruce was assigned an Apgar score of 0, indicating that he was essentially dead.

24. At five minutes, Bruce's Apgar score was two, reflecting a severally depressed infant.

25. Approximately 20-25 minutes after birth, Bruce was resuscitated to the point where he was transferred to the newborn nursery.

26. Due to Bruce's severe condition at birth, he was transferred to a larger medical facility, the Wilford Hall Medical Center in San Antonio, Texas.

27. A neonatal transport team arrived from Wilford Hall at approximately 5:00 p.m. on June 25th and flew Bruce to that facility.

28. While at Wilford Hall, Bruce was treated for his respiratory problems and for seizures, and was discharged on July 14, 1985 in apparently good condition.

29. Following Bruce's discharge, he accompanied his parents to McChord Air Force Base, Washington where his father was assigned following completion of a military school he had been attending at Sheppard Air Force Base.

30. Since July 1984, Bruce, Jr. has continuously resided in the area of Tacoma, Washington.

31. Bruce initially lived with his parents until their divorce in October 1988.

32. Throughout his entire life, Bruce has lived continuously with his mother, Brenda Gordon Brantley.

33. Based upon testimony from several witnesses, Brenda Gordon Brantley has been a very attentive, caring and loving mother of Bruce Gordon, Jr.

34. Despite Bruce's multiple handicaps, his mother continues 'to have a very positive attitude with a strong desire to maximize whatever potentials Bruce possesses.

35. Although Mr. Gordon is presently assigned to military duties with the Air Force in Korea, he also demonstrates a strong love for Bruce, Jr. and has spent much time with his son, and provides medical care for him. Mr. Gordon is also interested in providing the best possible care for Bruce, Jr.

36. Bruce Gordon, Jr. 's medical records from Sheppard Air Force Base in June 1984, describe his diagnosis as "Respiratory distress secondary to meconium aspiration."

37. At no time did any medical personnel, or anyone else, suggest to Mr. and Mrs. Gordon that Bruce's multiple

handicaps are due to anything other than the natural stresses of birth and his own aspiration of his meconium.

38. One of the causes of Bruce, Jr.'s multiple handicaps is hypoxia that Bruce suffered *in utero* following his mother's admission to the hospital and prior to his Cesarean delivery at 12:40 pm.

39. The plaintiffs did not know, nor in the exercise of reasonable diligence, should they have known the cause of Bruce, Jr.'s injuries more than two years prior to October 3, 1988.

40. It took over two and one-half hours for Dr. Liang to perform a Cesarean section. This unreasonable delay by Dr. Liang in delivering Bruce Gordon, Jr. is a proximate cause of Bruce Gordon, Jr.'s multiple injuries.

41. The appropriate medical standard of care was the same at Sheppard Air Force Base, Wichita Falls, Texas at all times relevant herein, as would be applicable at a nonmilitary medical institution.

42. The appropriate medical standard of care, by the medical personnel at Sheppard Air Force Base, was not complied with as to the care and delivery of Bruce Gordon, Jr.

43. The evidence herein is undisputed that Bruce Gordon, Jr. has been, since his birth, suffering from the most profound injuries both physically and mentally. It is undisputed from the evidence that he will continue to be impaired by his injuries during his life expectancy, and will need ongoing medical and rehabilitation care during his lifetime.

44. The court finds that Bruce Gordon, Jr.'s life expectancy is age 50.

45. Bruce suffers from severe hypoxic ischemic encephalopathy manifested by severe retardation, acquired microcephaly, spastic quadriparesis, and pseudobulbar palsy.

46. Since moving to the State of Washington, Bruce has been receiving almost all of his medical care at Madigan Army Medical Center.

47. While the physicians at Madigan have painted very dismal pictures of Bruce Gordon, Jr.'s future, Mrs. Brantley refused to share in their pessimism, and has continuously and admirably exercised Bruce, provided loving care, and nurturing, always seeking to maximize his abilities and not dwelling on his limitations.

48. Bruce Gordon, Jr. is aware that he is different from other children and as a result thereof, will suffer lifelong mental anguish. Bruce Gordon, Jr. can feel pain and will continue to suffer pain in the future.

49. Bruce Gordon, Sr. and Brenda Gordon Brantley have been deprived of the normal relationship between parent and child; that they have suffered grievous mental anguish over their son's injuries; and that they have provided and will be required to provide extraordinary care to Bruce, Jr.

50. The detailed long care plan and estimated cost of care as set forth in Plaintiff's Exhibit 8A are reasonable and necessary as to the care and treatment of Bruce Gordon, Jr.

51. Bruce Gordon, Jr. is entitled to be awarded damages for the following:

A. Lost Earning Capacity

B. Medical Services

C. Medical Commodities

D. One Time Costs

E. Taxes On Interest

F. Past Pain and Suffering

G. Future Pain and Suffering

52.Brenda Gordon Brantley is entitled to be awarded damages for the following:

A. Past Nursing and Custodial Services

B. Past Mental Anguish/Impairment of Parent/Child Relationship

C. Future Mental Anguish/Impairment of Parent/Child Relationship

53. Bruce Gordon, Sr. is entitled to be awarded damages for the following:

A. Past Nursing and Custodial Services

B. Past Mental Anguish/Impairment of Parent/Child Relationship

C. Future Mental Anguish/Impairment of Parent/Child Relationship

The foregoing Findings of Facts are supported by the more credible evidence produced by plaintiffs and are by a preponderance of the evidence.

CONCLUSIONS OF LAW

Any of the foregoing Findings of Fact that are Conclusions of Law are hereby adopted as Conclusions of Law.

1. Jurisdiction and venue are appropriate in this District, 28 U.S.C. §1346(b), 1402(b).

2. The defendant's failure to perform an earlier Cesarean section on June 2, 1984 was a proximate cause of the injuries and damages to Bruce Gordon, Jr., and to his parents, Bruce Gordon, Sr., and Brenda Gordon Brantley.

3. The standard of care in medical malpractice cases in Texas and at Sheppard Air Force Base is the same as anywhere else in the United States.

4. Defendants' employees, herein at Sheppard Air Force Base, breached the standard of care that Bruce Gordon, Jr. was entitled to receive on June 25, 1984.

5. The defendant's liability is to be determined in accordance with the law of Texas, where the medical care was rendered to the plaintiffs. Title 28 U.S.C. §2674.

6. The cause of action accrued less than two years prior to the filing of plaintiffs' administrative claims with the Air Force on October 3, 1988. Title 28 U.S.C. §2401(b).

7. Bruce Gordon, Jr. is awarded damages as follows:

A. Lost Earning Capacity	$402,821.00
B. Medical - Services	4,301,730.00
C. Medical Commodities	237,763.00
D. One-Time Costs	4,910.00
E. Taxes on Interest	1,639,799.00
F. Past Pain and Suffering	300,000.00
G. Future Pain and Suffering	1,000,000.00
SUBTOTAL	$7,887,023.00

8. The figures, as to lost earning capacity, are reduced to present value using a 3% net discount rate as expressed by Dr. Bassett in his economic analysis, and the medical supplies and commodities are reduced to present value using a 2% net discount rate. In calculating present value of medical care and services a complete offset or 0% was used. The taxes on interest were computed under the Internal Revenue Tax Code. The economic losses sustained by Bruce Gordon, Jr.-were ascertained in accordance with Plaintiff's Exhibit 9.

9. Brenda Gordon Brantley is awarded the following *damages:*

A. Past nursing and custodial services	$100,000.00
B. Past mental anguish/ Impairment of Parent Child Relationship	100,000.00
C. Future mental anguish/ Impairment of Parent Child Relationship	75,000.00
SUBTOTAL	$275,000.00

10. Bruce Gordon, Sr. is awarded the following damages:

A. Past nursing and custodial services	$20,000.00
B. Past mental anguish/ Impairment of Parent Child Relationship	50,000.00
C. Future mental anguish/ Impairment of Parent Child Relationship	25,000.00
SUBTOTAL	$95,000.00

11. Should any of the foregoing awards to Bruce Gordon, Jr. for his medical services and commodities be found to be more properly awarded to either or both of his parents to provide for Bruce's care, then those amounts that were designated for Bruce, Jr. should be awarded to the appropriate parent(s).

12. Judgment is awarded in favor of the plaintiffs and against the defendant, plus taxable costs:

A. Bruce Gordon, Jr.	$7,887,023.00
B. Brenda Gordon Brantley	$275,000.00
C. Bruce Gordon, Sr.	$95,000.00
TOTAL	$8,257,023.00

DATED at Tacoma, Washington, this 30th day of JULY, 1991.

UNITED STATES DISTRICT COURT JUDGE

APPENDIX E

United States District Court

WESTERN DISTRICT OF WASHINGTON

BRUCE J. GORDON, ET AL.,

v.

UNITED STATES OF AMERICA

JUDGMENT IN A CIVIL CASE
CASE NUMBER: C90-5206T

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment is awarded in favor of the plaintiffs and against the defendants, plus taxable costs:

Bruce Gordon, Jr.	$7,887,023.00
Brenda Gordon Brantley	$275,000.00
Bruce Gordon, Sr.	$95,000.00
TOTAL	$8,257,023.00

July 30, 1991
Date

BRUCE RIFKIN
Clerk

Janine R. Thornton
(By) Deputy Clerk